# SUPREME COURT OF THE UNITED STATES.

No. ~~159.~~ 136

TIMOTHY CONWAY, PLAINTIFF,

vs.

GEORGE J. STANNARD AND WILLIAM H. RAND.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

**FILED DECEMBER 2, 1871.**

1 United States circuit court, district of Vermont.

TIMOTHY CONWAY
*vs.*
GEO. J. STANNARD & WILLIAM H. RAND.

Be it remembered that, at a term of the circuit court of the second circuit of the United States, begun and holden at Windsor, within and for the Vermont district, on the fourth Tuesday of July, A. D. 1869, comes George J. Stannard and William H. Rand, all of said Vermont district, and presented their petition to said circuit court, in the words and figures following:

Orleans county court. December term, A. D. 1868.

TIMOTHY CONWAY
*vs.*
GEO. J. STANNARD, W'M H. RAND.

*Defendant's petition to remove the aforesaid cause for trial to the United States circuit court.*

To the hon. circuit court of the United States of America within and for the district of Vermont:

2 The petition of George J. Stannard, of Burlington, and William H. Rand, of Newport, in the district of Vermont aforesaid, respectfully shows that, on or about the 18th day of January, A. D. 1867, he, the said George J. Stannard, one of said defendants, was, and for a long time before had been, and still is, collector of the customs and revenues of the United States within and for said district of Vermont; and that the said W'm H. Rand, one of said defendants, was, on the said 18th day of January, and for a long time before had been, and still is, an inspector of the customs and revenues of said United States for the district of Vermont; and, as such officers, at Coventry, in said district, on or about the day and year last aforesaid, did seize two certain horses, one single sleigh, one harness, and one wagon, which had been used in transporting goods, wares, and merchandize, which were liable to duty on being imported into the said United States, and which had been smuggled and clandestinely introduced and illegally imported into the said United States from some foreign territory.

3 The said two horse', one harness, one sleigh, and one wagon, by reason of being used for the transportation of such goods, wares, and merchandize, as aforesaid, became forfeited to the said United States by virtue of the statutes of said United States.

Whereupon, and by reason of the premises, it became the duty of said def'ts, Stannard & Rand, as such officers as aforesaid, to seize said two horses, one harness, one sleigh, and one wagon, as being forfeited as aforesaid.

And your petitioners further shew that, on the 7th day of December, A. D. 1867, the said Timothy Conway, plaintiff in the above-entitled cause, commenced his suit against your petitioners, in the words and figures following, viz:

"STATE OF VERMONT, *Orleans Co., ss:*

"To any sheriff or constable in the State, greeting:

"By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of George J. Stannard, of St. Albans, in the county of Franklin, and W'm H. Rand, of
4 St. Johnsbury, in the county of Caledonia, to the value of 400 dollars, and notify them thereof according to law; and for want thereof, take their bodies, if to be found within your precinct, and them safely keep, so that you have them to appear before the county court next to be held at Irasburgh, within and for said county of Orleans, on the 4th Tuesday of December next, then and there, in said court, to answer to Timothy Conway, of Coventry, in the county of Orleans, in a plea of trespass, for that the said defendants, heretofore, to wit, on the 18th day of January, A. D. 1867, at Coventry, in said county of Orleans, with force and arms, took and carried away one bay mare, one brown mare, one single sleigh and harness, and one wagon, of the value of three hundred dollars, the property, goods, and chattels of the plaintiff, and conveyed the same to their own use, and other enormities to the pl'ff the said defendants then and there did, against the peace of the State, to the damage of the plaintiff 400 dollars; for the recovery of which, with just costs, the plaintiff brings suit.

5 "Fail not, but make service and return according to law.

"Dated at Newport, in the county of Orleans, the 7th day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

"M. G. SARGENT,
"*Justice Peace.*

"W. D. Crane and J. T. Allen recognized to the defendant in the sum of twenty dollars as surety of costs of prosecution as the law directs.

"Before me,

"M. G. SARGENT,
"*Justice of the Peace.*"

Which said writ was served on the def'ts, the petitioners, by arresting their bodies, as will more fully appear by the return thereon indorsed, which said return was in the words and figures following, viz:

"STATE OF VERMONT, *Orleans County, ss:*

"At Newport, on this 8th day of December, A. D. 1868, by virtue of this writ, I arrested the body of William H. Rand, one of the within defendants, and read the same in his hearing, and S. W. Dane became his bail by endorsing his name on this writ as bail thereon; and, on the same day, at the request of the said William H. Rand, I gave
6 him a true and attested copy of this writ, with this, my return herein thereon indorsed.

"Attest:

"S. G. BEAN,
"*Dep'y Sheriff.*

"A true copy. Attest:

"S. G. BEAN,
*Dep'y Sheriff.*"

Which suit is now pending in Orleans County court, in said district of Vermont, in which said suit the said plaintiff declares against said

def'ts in trespass for the taking of said two horses, sleigh, harness, and wagon as aforesaid, and for no other cause whatever.

And so said suit was commenced and is now pending in favor of said pl'f against said defendants for and on account of an act done under the revenue laws of the United States as aforesaid.

And your petitioners pray that said cause be removed from said Orleans county court to the next circuit court of the United States, to be holden at Windsor, within and for said district of Vermont, on the 4th Tuesday of July, A. D. 1869, and therefore file their said petition in the clerk's office of the United States circuit court in said dis-
7 trict, and pray that said cause be entered on the docket of said circuit court, and be proceeded in as a cause originally commenced in said United States circuit court.

GEO. J. STANNARD.
WM. H. RAND.

We, George J. Stannard, of Burlington, and Wm. H. Rand, of Newport, within the district of Vermont, of lawful age, on oath say that the facts stated in the foregoing petition signed by us are true.

GEO. J. STANNARD.
W'M H. RAND.

UNITED STATES OF AMERICA,
*District of Vermont:*

At Newport, in said district, this eighth day of December, A. D. 1868, personally appeared the above-named George J. Stannard and W'm H. Rand, and made oath that the facts set forth in their foregoing petition and affidavit are true.

Before me,

L. H. BISBEE,
*United States Commissioner.*

United States circuit court, district of Vermont, July term, A. D. 1869.

TIMOTHY CONWAY
*vs.*
GEORGE J. STANNARD, W'M H. RAND.

8 Petition of George J. Stannard & W'm H. Rand to remove said cause from Orleans county court to the United States circuit court for the district of Vermont.

I, Lewis H. Bisbee, an attorney at law of a court of record in the State of Vermont, hereby certify that, as counsel for the defendants in the above-entitled cause and the petitioners herein named, I have examined the proceedings against them, the said petitioners, and have carefully inquired into all the matters set forth in their said petition, and believe the same to be true.

L. H. BISBEE,
*Att'y at Law.*

The President of the United States of America to the marshal or either of his deputies within and for the district of Vermont, greeting:

You are hereby commanded that the bodies of George J. Stannard, of Burlington, & William H. Rand, of Newport, in said district of Vermont, who were arrested, and are now under bail to appear before the Orleans county court next to be held at Irasburgh, within and

9 for the county of Orleans aforesaid, together with the day and cause of their being arrested and bailment, by whatever names they, the said George J. Stannard and William H. Rand shall be called or charged, you have, before the honorable United States circuit court next to be holden at Windsor, within and for the district of Vermont, on the 4th Tuesday of July, A. D. 1869, to do and receive what the said court shall then and there consider concerning in this behalf; and have you there this writ.

Witness the Hon. S. P. Chase, Chief Justice of the Supreme Court of the United States, at Windsor, this 18th day of December, A. D. 1868, & of the independence of the United States the 93d.

[L. S.] B. B. SMALLEY, *Clerk.*

S. W. Dane is hereby authorized to serve & return this writ.

B. B. SMALLEY, *Clerk.*

UNITED STATES OF AMERICA,
*District of Vermont, ss:*

At Irasburgh, on this 22d day of December, A. D. 1868, I made service of this writ by delivering a true and attested copy of the same to I. N. Cushman, clerk of Orleans county court, with my return herein thereon endorsed.

Attest:

S. W. DANE,
*Authorized Person.*

10 Serving writ, 2.00; 120 miles travel, 7.20; 1 copy, 3.00; transporting respondents, 24.00; S. W. Dane, travel, 12.00—$48.20.

And thereupon, on motion of the attorney for said Stannard and Rand, it was ordered that said cause be entered on the docket of this court, and it was so entered.

And afterwards, said cause was continued until the October term, A. D. 1869, of this court.

And afterwards, at said October term, A. D. 1869, the said cause was continued until the February term, A. D. 1870, of this court.

And afterwards, on the day of February, A. D. 1870, the said defendants filed their pleas in the words and figures following:

U. S. circuit c't, Feb. T., 1870.

TIMO. CONWAY
*v.*
GEORGE J. STANNARD & ALS.

11 And now comes the def'ts, by their att'y, and defend, &c., when, &c., and say they are not guilty in manner and form as the pl'ff hath alleged; and put themselves upon the country.

B. F. FIFIELD *Att'y.*

And, for further plea in this behalf, by leave of court first had and obtained, these def'ts say that, heretofore, to wit, on the 14th day of June, A. D. 1868, and for a long time thereafter, to wit, for six months

thereafter, the said Stannard was collector, and the said Rand was inspector, and the said Rennely was inspector of customs, in and for the revenue district of Vermont; that, on the day aforesaid, to wit, at Coventry, in said district, these def'ts, as such officers of the customs, and not otherwise, did seize said mares, wagon, and sleigh, and harness in said declaration mentioned, as forfeited to the United States; the said mares, wagon, sleigh, and harness having been, before that time, to wit, on the 14th day of June, A. D. 1868, used in smuggling and illegally importing into the district of Vermont goods, wares, and merchandize, subject to duty, from the Dominion of Canada, and
12 without the delivery of a manifest at the office of the collector or deputy collector nearest the boundary line or road by which said goods, wares, and merchandize were brought in, whereby they became and were then and there forfeited to the United States.

And these def'ts further say that L. H. Bisbee, who was at the time of said seizure a deputy collector of customs in and for said district of Vermont, being of opinion that the value of said property did not exceed five hundred dollars, caused a list and particular description of said property to be prepared in duplicate, and there being no sworn appraisers under the revenue laws at or near the place of seizure, the said Bisbee did then and there appoint S. W. Dana and A. M. McLary, two disinterested citizens of the United States, and residents of said district, to appraise said property. And they then and there, first having been sworn to a faithful discharge of their duties in that behalf, did examine and make an appraisal, duly attested by them, of said property, at the value of one hundred and ninety-one dollars, all which was then and there duly attested and certified to by said Bisbee. And no
13 claim to said property having been interposed, said appraisers did then and there certify on oath in their appraisal, their belief that the property seized was liable to speedy determination, and that the expense of its keeping would largely reduce the net proceeds of the sale thereof.

And the def'ts further say that, afterwards, to wit, on the 15th day of Jan., 1868, the said Stannard, as such collector, did publish a notice in the Newport Express, a weekly newspaper, published at Newport, in Orleans County, of the seizure and intended sale of said property, for such length of time as he thought reasonable, and more than one week, which notice was then and there in the words and figures following:

"NOTICE OF SEIZURE AND SALE.—The following-described property was seized by officers of the customs for violation of the revenue laws of the United States, viz, at Coventry, Vt., Jan. 14, 1868: 1 bay mare, 1 brown mare, 1 single sleigh, one harness, 1 wagon.

"Said property will be sold at public auction, at the custom-house, in Newport, Vt., on Wednesday, 29th inst., at 11 o'clock a. m.

"GEORGE J. STANNARD,
"*Collector of Customs.*

14 "CUSTOM-HOUSE, DISTRICT OF VERMONT,
"*Collector's Office, Burlington, Jan.* 18, 1868."

And afterwards, to wit, on the 29th day of January, A. D. 1868, at the custom-house in Newport aforesaid, at 11 o'clock a. m., the said Stannard, as such collector, did sell said property at public auction; and afterwards, on the same day, did deposit the proceeds of said sale to the credit of the Treasurer of the United States.

And these def'ts further say that no information has been filed in the

United States district court of Vermont, for the forfeiture of said property, which court alone has jurisdiction to try the question of forfeiture. All which is the same trespass and wrongs in said declaration mentioned. All which these def'ts are ready to verify. Wherefore they pray judgment, &c.

B. F. FIFIELD, *Att'y.*

And afterwards, at said February term, A. D. 1870, the said cause was continued to the July term, A. D. 1870, of this court.

And afterwards, on the 7th day of June, A. D. 1870, the plaint-
15 iff filed his demurrer to the said pleas, in the words and figures following:

United States circuit court for the district of Vermont, Feb'y term, A. D. 1870.

TIMOTHY CONWAY
*v.*
GEORGE J. STANNARD ET AL.

And the plaintiff, by his attorneys, Crane & Allen, as to the said plea of the said defendants, by them secondly above pleaded, saith that the same and the matters therein contained in manner and form, as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendants, and that he, the said plaintiff, is not bound by law to answer the same. And this he, the plaintiff, is ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damage by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, & for his costs.

By his attorneys, CRANE & ALLEN.

And afterwards, at the July term, A. D. 1870, of said court, the said cause came on for hearing before the Honorable Lewis B. Woodruff, circuit judge within and for the second circuit, and Honorable David A. Smalley, district judge within and for the Vermont district, on the pleadings as hereinbefore set forth; and, after hearing counsel for plaintiff and defendants, the cause was continued until the October term, A. D. 1870, of this court.

And afterwards, at said October term, A. D. 1870, the said cause was continued until the February term, A. D. 1871, of this court.

And afterwards, at the said February term, A. D. 1871, the said cause was continued until the July term, A. D. 1871, of this court.

And afterwards, at said July term, A. D. 1871, the said cause was continued to the October term, A. D. 1871, of this court.

And at said October term, A. D. 1871, said cause came on again
for hearing before Hon. Lewis B. Woodruff, circuit judge, and
17 Hon. David A. Smalley, district judge.

And thereupon the court ordered that a certificate of division of opinion be filed in the words and figures following:

UNITED STATES OF AMERICA.
*District of Vermont:*

At a circuit court of the United States begun and held at Rutland, for the district of Vermont, on the 3d day of October, A. D. 1871.

Present, Hon. Lewis B. Woodruff, and Hon. David A. Smalley.

TIMOTHY CONWAY.
*v.*
GEORGE J. STANNARD & ALS.

*State of the pleadings.*

This is an action of trespass de bonis asportatis, and was originally brought to a State court, to wit, Orleans county court, in the State of Vermont, and was thence removed on petition of defendants to the United States circuit court under the third section of the act of March 2d, 1833, the defendants being customs revenue officers of the
18 United States. A copy of the declaration is hereto attached, and is referred to.

The defendants, among other things, plead one special plea in bar, a copy of which is hereto attached, and is referred to, to which the plaintiff demurs generally, and the defendants join in demurrer.

This case coming on to be argued at this term, it occurred as a question whether defendant's plea under all the facts therein set forth, was a bar to this action.

On which question the opinion of the judges was opposed.

Whereupon, upon motion of the plaintiff, by his counsel, that the point in which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided—

It is ordered that the foregoing state of the pleadings be certified, according to the request of the plaintiff by his counsel and the law in that case made and provided.

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L. B. WOODRUFF,
*Circuit Judge.*
D. A. SMALLEY,
*District Judge.*

UNITED STATES OF AMERICA,
*District of Vermont, ss:*

I, Bradley B. Smalley, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighteen, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Timothy Conway vs. George J. Stannard, and W'm H. Rand, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Burlington, in the Vermont district, in the second circuit, this 25th day of November, A. D. 1871, and of the independence of the said United States the ninety-sixth.

[SEAL.] B. B. SMALLEY, *Clerk.*

(Indorsed Timothy Conway vs. Geo. J. Stannard, & W'm H. Rand. Record from circuit court, district of Vermont.

(Indorsement on cover:) No. 459. Timothy Conway, plaintiff, vs. George J. Stannard and William H. Rand. Certificate of division. Vermont C. C. U. S. Filed 2nd December, 1871.

TIMOTHY CONWAY
v.
STANNARD & RAND.

SUPREME COURT
OF THE UNITED STATES,
October Term, 1873.

## PLAINTIFF'S BRIEF.

Prior to the Act of July 18, 1866, any property seized by revenue officers of the United Stotes, as SUBJECT TO FORFEITURE, for violation of the revenue laws, must be libelled and condemned by judgment of the proper court before the owner could be divested of his title, or the proceeds of the property paid into the Treasury.

By that Act (July 18, 1866) when the property taken, in the opinion of the seizing officer, does not exceed five hundred dollars in value, he may cause the same to be appraised, and if the amount of the appraisal doos not exceed five hundred dollars, he shall publish a notice of such seizure for three weeks successively, describing the property, and stating the time, cause, and place of seizure, and requiring any person claiming such property to appear and file his claim with the collector within twenty days from the first publication of such notice. Sec. 11, U. S. Stat. 14, 180.

If the claimant files his claim within the twenty days, and gives a proper bond, then the District Attorney is to institute the proper proceedings to enforce the forfeiture, as in cases exceeding five hundred dollars in value. Sec. 12, same act.

If no claimant appears within the twenty days, the seizing officer is to advertise the property for sale, giving NOT LESS THAN FIFTEEN DAYS NOTICE, and after sale to deposit the proceeds of the sale to the credit of the Treasurer of the United States.

The 13th Sec. of the same act provides, that within three months after such sale, the owner of the property may apply to the Secretary of the Treasury for a remission of the forfeiture, and a restoration of the proceeds of such sale; and the Secretary may grant the same, on satisfactory proof "that the applicant at the time of the seizure and sale of the property in question did not know of the seizure, and was in such circumstances as prevented him from knowing of the same, and that such forfeiture was incurred without wilful negligence or any intention of fraud

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The 15th Section of the Act provides for cases of perishable property, and such as will be expensive to keep.

In such cases, the appraisers, are not only to fix the value, but also to certify on oath, that in their belief, the property is liable to speedy deterioation, or the expenses of its keeping will largely reduce the net proceeds of the sale.

If the appraisers properly certify that the property is perishable, or cannot be kept without disproportionate expense "AND WHERE NO CLAIM SHALL HAVE BEEN INTERPOSED THEREFOR, AS IS HEREINBEFORE PROVIDED" then the officer may proceed to advertise and sell the property, and shall at such time as he thinks reasonable, BUT NOT LESS THAN ONE WEEK.

The substantial effect of a seizure and sale of property under these provisions, is to deprive the owner of his property without any judicial determination against him, or against his property.

He may within three months at his own cost and expense appeal to the CLEMENCY OR DISCRETION of the Secretary of the Treasury, but all legal intendments and presumptions are against him; the burden of proof is thrown upon him, to show that his property was not forfeited, or that the violation of law was unintentional, and even this will not suffice, unless he also prove that he had no knoledge of the seizure,

The mere statement of the Statute, and its severe penal consequences, is enough to show that every requirement of it should be most strictly observed. The proceeding is far more IN INVITUM than those usually so characterized; tax sales, or Execution sales, and the like.

The notice by publication, is all the notice that the owner of the property is required to have before he is deprived of his property by an official, and quasi judicial sale.

He is expressly given twenty days within which to file his claim and bond, and thus entitle himself to a legal trial before he is deprived of his property.

These are absolute and indispensible conditions required by the law, before the seizing officer has any authority to even advertise the property for sale, and so absolutely essential are they for the protection of the owner, that they cannot be disregarded. In the present case the Defts utterly ignored these provis-

for sale on the next day after seizing it, without notice to the Plff. and without opportunity to assert his claim.

Upon all the authorities from the Six Carpenters case to this time, this wanton and flagrant violation of the law made the Defts. tresspassers ab initio, and liable in trespass for the property.

On the trial below it was claimed that Defts. were only guilty of a non feasance, and that a mere non feasance does not make the party guilty of it a trespasser ab initio. The principle stated is sound, but has no application to the present case.

Where property has been lawfully seized, but the right to detain it has ended, the omission to return it to the owner, has been held not to make a party a trespasser ab initio.

Mere negligence in keeping property seized under legal process, would not make the officer a trespasser ab initio.

The case of FERRIN v. SYMONDS 11 N. H. 363, is a good example of that.

The case of Adams v. Adams 13 Pick. 384, where it was held that Deft's. neglect to properly feed Plff's cows which he had impounded, made him a trespasser ab initio has been questioned on that ground.

But I have found no case, and I believe none can be found, where an officer has neglected to perform an act, legally required as preliminary to a sale, or has sold before he had by law a right to sell; but holds him liable as a trespasser ab initio. I refer the court to the following authority:

Purrington v. Loring, 7 Mass. 388.
Pierce v. Benjamin, 14 Pick. 356.
Smith v. Gates, 21 Pick. 55.
McGough v. Wellington, 6 Allen, 505.
Blake v. Johnson, 1 N. H. 91.
Barrett v. White et. al., 3 N. H. 210.
Ferrin v. Symonds, 11 N. H. 363.
Cate v. Cate, 44 N. H. 211.
Sutton v. Beach, 2 Vt. 42.
Stoughton v. Mott, 13 Vt. 175.
Bond v. Wilder, 16 Vt. 393.
Lamb v. Day et. al., 7 Vt. 407.
Briggs v. Gleason, 29 Vt. 78.

Smiths' Leading cases. Note to Six Carpenter case Vol. 1, 321.

Hillard on Torts, Vol. 1, pp. 105, 106, 107.

On the argument below, the Defts. claimed that this action could not be sustained because in it the question of forfeiture could not be tried. If the Defts, have proceeded legally in the disposition of the property, the Plff. cannot raise any question on that score against them.

If Defts. have been guilty of such flagrant and wanton disregard of the law as to forfeit all right to shelter themselves under their official character, they can take no advantage of the liability of the property to forfeiture.

The demurrer to the plea of course admits for the purpose of the trial, that the property was liable to be forfeited.

But this is a liability to be enforced only by the government, not by strangers, and not by officers of the government, except according to law, and in the observance of all those requirements established for the protection of the citizen.

This question of jurisdiction was attempted to be made in STOUGHTON v. MOTT, 13 Vt. 175, and was most satisfactorily disposed of by the Court.

L. P. POLAND, FOR PLFF.

# In the Supreme Court of the United States.

OCTOBER TERM, 1873.

TIMOTHY CONWAY,
*vs.*
GEORGE J. STANNARD *et al.* } No. 36.

*On certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Vermont.*

BRIEF FOR THE DEFENDANTS.

# In the Supreme Court of the United States.

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TIMOTHY CONWAY,
*vs.*
GEORGE J. STANNARD *et al.* } No. 36.

*On certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Vermont.*

## BRIEF FOR THE DEFENDANTS.

### STATEMENT.

Trespass *de bonis asportatis* against the collector and inspector of customs for the district of Vermont, for taking and carrying away the horses, sleigh, harness, and wagon of the plaintiff.

Plea: That the defendants, as officers of the customs, did seize said articles as forfeited to the United States, they having been, before that time, used in smuggling and illegally importing into the district of Vermont goods, wares, and merchandise subject to duty, from the Dominion of Canada, and without the delivery of a manifest at the office of a collector or deputy collector nearest the boundary line or road by which said goods, wares, and merchandise were brought in, whereby they became, and were then and there forfeited to the United States;

That, at the time of said seizure, a deputy collector of customs in and for said district, being of opinion that the value of said property did not exceed $500, caused

a list and particular description of the same to be prepared in duplicate, and, there being no sworn appraisers at or near the place of seizure, did appoint two disinterested citizens of the United States and residents of said district to appraise said property; and they, then and there, having been sworn to a faithful discharge of their duties in that behalf, did examine and make an appraisal of said property at the value of $191; all which was then and there attested and certified to the deputy collector, and, no claim for said property having been interposed, said appraisers did then and there certify on oath, in their appraisal, their belief that the property seized was liable to speedy deterioration, and that the expense of its keeping would reduce the net profits of the sale thereof; and, after due notice, the collector did sell said property at public auction, and did deposit the proceeds of said sale to the credit of the Treasury of the United States.

That no information has been filed in the United States district court for the forfeiture of said property, which court alone has jurisdiction to try the question of forfeiture.

To this plea, the plaintiff demurred.

Upon the case coming on for argument in the circuit court, the opinion of the judges was opposed upon the question whether the defendant's plea, under all the facts therein set forth, was a bar to this action.

ARGUMENT.

The sale of the property in this case seems to have been made under the authority of the act of 1866, ch. 201, sec. 12. (14 U. S. Stat., 181.)

The plaintiff's demurrer admits that, at the time of the seizure of his property, it had been used in smuggling and illegally importing goods, wares, and merchandise, and had thus become forfeited to the United States.

Where a forfeiture is made absolute under the revenue laws, a decree of condemnation relates back to the time of the commission of the offence, and so divests from that date all property in the plaintiff as to bar any claim, however equitable, subsequently accruing thereto.

Henderson's Spirits, 14 Wallace, 44.

In an action for seizing property as forfeited under the revenue laws, a judgment of condemnation or a judgment of restitution, without a certificate of probable cause, in a proceeding *in rem* for the forfeiture of the property, is conclusive upon the rights of the parties.

Gelston *vs.* Hoyt, 3 Wheat., 246.

Where there has been no information filed for condemnation of the property, reasoning by analogy, it would follow that the whole question of whether a forfeiture had been incurred could be tried in an action of trespass in which it arises incidentally. The question in issue there is the injury done to the plaintiff by the seizure. But, if the property has become forfeited to the Government, and the decree of forfeiture relates back to the time of the offence, in what has the plaintiff been injured?

The question as to whether the collector, in not in-

stituting proceedings for the condemnation of the property, has been guilty of a dereliction of duty or not, is *res inter alios.* The only issue in the action of trespass is the injury done to the plaintiff.

In the present case, the plaintiff admits that forfeiture had been incurred at the time of the seizure. The property, therefore, became liable to seizure and to forfeiture, and a condemnation would relate back to the time of the offence. Consequently, the plaintiff has suffered no injury from the act of the defendants.

In the case of Hall *vs.* Warren, 2 McLean, 332, it was held that there could be no justification for a seizure except on a judgment of condemnation in the district court or a certificate of reasonable cause, because the district court had exclusive jurisdiction of forfeitures.

But, with great respect for so high an authority, it is submitted that, because a process *in rem* for the condemnation of the property can only be tried in the district court, it does not follow that another court in trying the respective rights of the parties may not incidentally pass upon the question of whether a forfeiture had been incurred. A court may have no jurisdiction to try a man for a larceny, or for any other crime, and yet a civil action may come before it which turns entirely upon the question as to whether the plaintiff or defendant, as the case may be, has been guilty of acts that amount to larceny. A strong illustration of this is, that, while courts have no direct jurisdiction to try a question of privilege or breach of privilege of Parliament, yet, in an ordinary case, that question may be incidentally involved, and may, in fact, be the only issue between the parties.

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